

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES D. SMITH,

Plaintiff,

v.

BRIAN MCGARVIE, *et al.*,

Defendants.

Case No. C05-5156RJB

ORDER ADOPTING REPORT
AND RECOMMENDATION,
GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT, AND DISMISSING
CASE

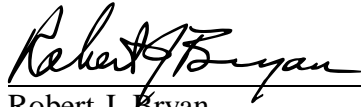
The Court, having reviewed plaintiff's complaint, the Report and Recommendation of Magistrate Judge J. Kelley Arnold (Dkt. 116), objections to the Report and Recommendation (Dkt. 118), and the remaining record, does hereby find and **ORDER**:

(1) In his objections (Dkt. 118), plaintiff argues that the magistrate judge erred in permitting defendants to file a second summary judgment motion; that the evidence supporting defendants' motion for summary judgment is inadmissible hearsay; and that defendants were deliberately indifferent to his serious medical needs because some of the recommendations of certain health care providers were not followed. The magistrate judge did not err in permitting defendants to file a second motion for summary judgment; the evidence in support of defendants' motion for summary judgment was sufficient to meet the standard under Fed.R.Civ.P. 56; and even if some of the recommendations of health care providers were not followed, the record shows that plaintiff was seen consistently for his shoulder injury, and he was given treatment and followup care. At most, plaintiff has shown that there may have been disagreements about some of his treatment. A

1 difference in opinion as to diagnosis or treatment does not establish a constitutional violation.
2 *Shields v. Kunkle*, 442 F.2d 409, 410 (9th Cir. 1971). Further, inadequate treatment due to
3 negligence, inadvertence, or differences in judgment between an inmate and medical personnel does
4 not constitute cruel and unusual punishment. *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir.
5 1981). Plaintiff's objections are without merit.

6 (2) The Report and Recommendation (Dkt. 116) is **ADOPTED**. Defendants' motion for summary
7 judgment (Doc. 101) is **GRANTED**. With regard to plaintiff's claim of inadequate medical care,
8 defendants have shown that there are no outstanding issues of fact and that they are entitled to
9 judgment as a matter of law; plaintiff's claim that defendants violated his Eighth Amendment rights
10 by denying him adequate medical care is **DISMISSED**. Plaintiff's remaining claims are
11 unexhausted and are accordingly **DISMISSED**.

12 (3) The Clerk is directed to send copies of this Order to plaintiff and to the Hon. J. Kelley Arnold.
13 DATED this 25th day of June, 2007.

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15 
16 Robert J. Bryan
United States District Judge